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No. 03-575

In the Supreme Court of the United States

FRANK M. PATTI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's unconditional plea of guilty waived his right to challenge on appeal the district court's denial of his motion to recuse the judge under 28 U.S.C. 455(a).

2. Whether a remand to the district court for resentencing was necessary under *Williams* v. *United States*, 503 U.S. 193 (1992), where the Eleventh Circuit found that an enhancement under Sentencing Guidelines § 3C1.1 for obstruction of justice was supported by two grounds on which the district court relied and the court of appeals determined that it was not necessary to address a third ground.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Aetna Cas. and Sur. Co., In re, 919 F.2d 1136 (6th Cir. 1990)	7
Faulkner, In re, 856 F.2d 716 (5th Cir. 1988)	7, 8
Nichols v. *Alley*, 71 F.3d 347 (10th Cir. 1995)	7, 8
School Asbestos Litig., In re, 977 F.2d 764 (3d Cir. 1992)	7
Shearer v. *United States*, 528 U.S. 827 (1999)	6
Tollett v. *Henderson*, 411 U.S. 258 (1973)	6
United States v. *Ancheta*, 38 F.3d 1114 (9th Cir. 1994)	12
United States v. *Arango*, 966 F.2d 64 (2d Cir. 1992)	10
United States v. *Arena*, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000)	8
United States v. *Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986)	7, 8
United States v. *Brinkworth*, 68 F.3d 633 (2d Cir. 1995)	7
United States v. *Broce*, 488 U.S. 563 (1989)	6
United States v. *Chandler*, 996 F.2d 1073 (11th Cir. 1993), cert. denied, 512 U.S. 1224 (1994)	8-9
United States v. *Chantal*, 902 F.2d 1018 (1st Cir. 1990)	7

Cases—Continued: Page

United States v. *Corley*, 978 F.2d 185 (5th Cir. 1992) 13
United States v. *Dunnigan*, 507 U.S. 87 (1993) 12
United States v. *Gipson*, 835 F.2d 1323 (10th Cir. 1988) 6
United States v. *Hoctel*, 154 F.3d 506 (5th Cir. 1998) 6
United States v. *Horton*, 98 F.3d 313 (7th Cir. 1996) 7
United States v. *Jordan*, 49 F.3d 152 (5th Cir. 1995) 8
United States v. *Kendrick*, 22 F.3d 1066 (11th Cir. 1994) 13
United States v. *Knight*, 266 F.3d 203 (3d Cir. 2001) 12
United States v. *Leming*, 532 F.2d 647 (9th Cir. 1975), cert. denied, 424 U.S. 978 (1976) 13
United States v. *Rodriguez-Razo*, 962 F.2d 1418 (9th Cir. 1992) 13
United States v. *Tello*, 9 F.3d 1119 (5th Cir. 1993) 13
United States v. *Thayer*, 201 F.3d 214 (3d Cir. 1999), cert. denied, 530 U.S. 1244 (2000) 12-13
United States v. *Willard*, 909 F.2d 780 (4th Cir. 1990) 13
United States v. *Young*, 39 F.3d 1561 (11th Cir. 1994) 8
Williams v. *United States*, 503 U.S. 193 (1992) 11

Statutes, regulations and rule:

18 U.S.C. 371 1
18 U.S.C. 3742(f)(1) 11
26 U.S.C. 7206(1) 1
28 U.S.C. 455(a) 2, 5, 6, 7, 9, 10
28 U.S.C. 455(b) 10
28 U.S.C. 455(e) 10

Regulations and rule—Continued: Page

United States Sentencing Guidelines:
§ 2F1.1(b)(4)(B) 13
§ 3C1.1 ..... 5, 12, 13
§ 3E1.1(b) 13
Fed. R. Crim. P. 11(a)(2) 5, 9

Miscellaneous:

1A Charles Alan Wright, *Federal Practice and Procedure: Criminal* (3d ed. 1999) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 337 F.3d 1317. The orders of the district court (Pet. App. 17-31) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-16) was entered on July 18, 2003. A petition for a writ of certiorari was filed on October 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of filing a false income tax return, in violation of 26 U.S.C. 7206(1), and one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 79 months of imprisonment and ordered to pay a $125,000

fine, $48,460.59 for costs of prosecution, and $4,791,267.18 in restitution. The court of appeals affirmed. Pet. App. 1-16.

1. Petitioner owned Patti Shipyard Inc. (Shipyard), a boat-building company. During 1996, petitioner diverted to himself $1,098,996 paid to the Shipyard by the Army Corps of Engineers for two boats, and petitioner thereafter willfully failed to report any of the diverted funds on his 1996 individual income tax return. 4/12/02 Plea Tr. 10-11, 15. During 1996, petitioner also diverted more than $3 million related to three other shrimp boats without reporting those amounts on his 1996 individual income tax return. Gov't C.A. Br. 8-9.

During the years 1994 through 1998, petitioner was the 95% owner of Joe Patti Seafood (Patti Seafood), a corporation that operated a large seafood store in Pensacola, Florida. Petitioner conspired with Alice Guy, who was petitioner's fiancée and the General Manager at Patti Seafood, to defraud the United States by impeding the Internal Revenue Service in the ascertainment and collection of federal income taxes and FICA taxes. Petitioner and Guy engaged in a scheme whereby they paid Patti Seafood employees in cash and willfully failed to collect and pay required federal income and FICA taxes. Gov't C.A. Br. 11-12; 4/12/02 Plea Tr. 13-14.

2. Following indictment, petitioner's case was assigned to United States District Judge Lacey A. Collier. Before the scheduled trial date, petitioner filed a motion under 28 U.S.C. 455(a) to disqualify the judge for an alleged appearance of partiality. Petitioner asserted that he was informed by a man who was friends with the judge that the man could get the charges dropped if petitioner donated a large sum of money to a charity with which the judge was associated. Petitioner

also argued that the judge knew the United States Attorney and that the judge supported his reappointment. Pet. App. 2 n.2.

The district court denied petitioner's motion. Pet. App. 17-28. The court observed that the alleged discussion of a contribution to a charity favored by the judge in exchange for getting the charges dropped occurred seven days before petitioner's arraignment and the assignment of the case to the judge. *Id.* at 25. The court noted "[i]t is hard for a reasonable observer to imagine such a serious discussion as alleged concerning the 'bribery' of a judge who at the time was not known to be the judge assigned to try the case." *Ibid.* The court also rejected petitioner's allegation that the judge's expression of support for the United States Attorney created an appearance of partiality. The court explained that "[t]he fully informed observer would know that judges are frequently called upon to express an opinion concerning the competence of persons being considered for positions within the justice system." *Id.* at 22. The court further observed that "this judge had been complimentary in support of [petitioner's then-lead counsel] in his application for a federal position." *Id.* at 23. The judge also stated that a claim of favoritism toward the United States Attorney was undercut by readily available records showing that the judge in many cases had ruled against the United States Attorney's office. *Ibid.*

Petitioner subsequently filed with the district court a letter in which Micki Conti, the caregiver for the district judge's mother, stated that the judge had discussed certain aspects of petitioner's case in front of her and others. Pet. App. 2. The district court entered a supplemental order dated May 21, 2001, reaffirming its earlier denial of petitioner's motion. *Id.* at 29-31. The

court concluded that no reasonable observer, fully informed of the facts, could question the court's impartiality based on Conti's letter. *Id.* at 31. The court observed that "[a]ll alleged comments * * * concerned allegations appearing in the news media and the public record of the case." *Id.* at 30. The court also explained that "[i]t is not claimed—nor can it be—that this judge ever uttered or even insinuated any opinion about [petitioner], the merits of his case, or his guilt or innocence. Interestingly enough, one of the statements alleged indicates that the judge's only concern was that [petitioner] receive a fair trial, which is, after all, the single most important duty and responsibility of a presiding judge." *Ibid.*

On April 12, 2002, petitioner entered into a plea agreement, in which he unconditionally agreed to plead guilty to two counts in return for the government's agreement to dismiss the remaining 22 counts of the superseding indictment and not to pursue any additional tax charges against petitioner for the tax years 1993 through 1998. At the guilty plea hearing, the district court informed petitioner of his right to a jury trial, his right to counsel, his absolute right to remain silent, his right to confront witnesses called against him and to call witnesses on his own behalf, and the right to require the government to prove him guilty beyond a reasonable doubt. After being informed of his trial rights by the district court, petitioner indicated that he understood that he was waiving those rights by pleading guilty. Petitioner also indicated that he understood that he was giving up the right to appeal the question of his guilt or innocence and could only appeal his sentence. 4/12/02 Plea Tr. 8-9. Petitioner did not renew his recusal motion after entering his guilty plea.

Following a five-day sentencing hearing, the district court determined that the government had established three grounds for applying the two-level enhancement under Sentencing Guidelines § 3C1.1 to petitioner's offense level for obstruction of justice. Pet. App. 36-40. First, the court found that petitioner obstructed justice by feigning amnesia to delay a trial in the case. *Id.* at 36-37. Second, the court found that petitioner was involved in an attempted arson at his accountant's office in order to destroy documents relevant to his tax fraud. *Id.* at 37-38. Third, the court concluded that a media campaign by petitioner constituted an attempt to obstruct justice. *Id.* at 38-39. The district court sentenced petitioner to a total of 79 months of imprisonment, the middle of the applicable Guidelines range. Pet. App. 43-45, 49-50.

3. The court of appeals affirmed. Pet. App. 1-16. The court concluded that petitioner's unconditional guilty plea waived his right to challenge the district court's denial of the motion for recusal under 28 U.S.C. 455(a). Pet. App. 4-9. The court of appeals also observed that petitioner did not attempt to challenge the denial of the recusal motion either by petitioning for a writ of mandamus or by seeking to enter a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). Pet. App. 8-9.

The court of appeals also rejected petitioner's challenge to the district court's sentencing enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1. Pet. App. 12-16. The court concluded that the enhancement was supported by petitioner's feigned amnesia and malingering that postponed the trial and forced the government to waste time and resources in evaluating petitioner's competency. *Id.* at 13-14. The court of appeals also concluded that there was sufficient

evidence to support the district court's finding that petitioner was involved in the attempted arson at his accountant's office. *Id.* 14-15. The court of appeals concluded that because two of the three grounds found by the district court "independently support the obstruction enhancement," the court "need not consider the propriety of enhancing a defendant's sentence based upon statements made to the media." *Id.* at 13 & n.13.

ARGUMENT

1. Petitioner contends (Pet. 10-18) that, despite his unconditional guilty plea, he is entitled to appeal the district court's denial of his recusal motion under 28 U.S.C. 455(a). That contention lacks merit, and the conflict of authority identified by petitioner does not warrant this Court's review. This Court has denied certiorari previously in a case involving this same issue. See *Shearer* v. *United States*, 528 U.S. 827 (1999). There are no new circumstances warranting a different result here.

An unconditional guilty plea generally waives all nonjurisdictional defenses to a prosecution. *United States* v. *Broce*, 488 U.S. 563, 569 (1989); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); see generally 1A Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 175, at 222 (3d ed. 1999). Relying on that well-settled principle, the Eleventh Circuit has joined the courts of appeals for the Fifth and Tenth Circuits in holding that a defendant who has pleaded guilty may not thereafter appeal a judge's earlier denial of a motion to recuse under 28 U.S.C. 455(a). Pet. App. 4-9; *United States* v. *Hoctel*, 154 F.3d 506, 507 (5th Cir. 1998); *United States* v. *Gipson*, 835 F.2d 1323, 1324-1325 (10th Cir. 1988). In contrast, the First and Second Circuits have held that the denial of a Section 455(a)

motion is appealable notwithstanding entry of a guilty plea *United States* v. *Brinkworth*, 68 F.3d 633, 638 (2d Cir. 1995); *United States* v. *Chantal*, 902 F.2d 1018, 1021 (1st Cir. 1990).

The conflict does not warrant this Court's resolution. The rule adopted by the court of appeals in this case does not create insuperable barriers to appellate review for persons in the same position as petitioner. All of the courts of appeals that have considered the appealability of a recusal decision—including those that do not permit an appeal of a denial of a Section 455(a) motion following an unconditional guilty plea—have held that a defendant may petition for mandamus to obtain review of a district court judge's refusal to recuse himself. See, *e.g.*, *United States* v. *Horton*, 98 F.3d 313, 316 (7th Cir. 1996); *Nichols* v. *Alley*, 71 F.3d 347, 350 (10th Cir. 1995); *In re School Asbestos Litig.*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990); *In re Faulkner*, 856 F.2d 716, 720-721 (5th Cir. 1988). That view has been described as the "consensus position" of the courts of appeals. *In re School Asbestos Litig.*, 977 F.2d at 775. The Seventh Circuit has held that a failure to seek a writ of mandamus following the district court's denial of a recusal motion waives the argument on appeal, *Horton*, 98 F.3d at 316-317. The court cited *United States* v. *Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986), in which it had explained:

> [W]e have held that a writ of mandamus is an appropriate remedy against a judge who refuses to recuse himself when required to do so under that statute [28 U.S.C. 455(a)]. The writ of mandamus is the vehicle by which we may exercise our supervisory powers over the district courts with respect

> to § 455(a). To require a timely petition for a writ of mandamus as the sole remedy serves another important purpose: that of *preventing* injury to the public perception of the judicial system before it has a chance to occur. If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. Prevention in such circumstances is clearly preferable to attempts to cure.

Id. at 1205 (citations omitted). Courts have granted petitions for a writ of mandamus when the circumstances have so warranted. See, *e.g.*, *Nichols*, 71 F.3d at 352; *In re Faulkner*, 856 F.2d at 720-721. Because litigants have an adequate remedy to challenge the denial of a recusal motion, whether or not a guilty plea constitutes a waiver, there is no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals.

Petitioner contends (Pet. 17-18), however, that an immediate petition for a writ of mandamus was not "viable" because the Eleventh Circuit and other courts of appeals have reviewed disqualification denials after entry of final judgment. But the cases on which he relies are inapposite, because they involved appeals from judgments of convictions following jury trials. *United States* v. *Arena*, 180 F.3d 380, 398-399 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000); *United States* v. *Jordan*, 49 F.3d 152, 155-158 (5th Cir. 1995); *United States* v. *Young*, 39 F.3d 1561, 1569-1570 (11th Cir. 1994); *United States* v. *Chandler*, 996 F.2d 1073, 1103-

1104 (11th Cir. 1993), cert. denied, 512 U.S. 1224 (1994). Petitioner cites no decision holding that a defendant is barred from seeking a writ of mandamus before entering a guilty plea and, as discussed, many decisions have held that recusal denials are reviewable by way of mandamus. Moreover, petitioner did not attempt to seek mandamus, despite filing four interlocutory appeals and a petition for a writ of mandamus on other issues before entering his guilty plea. Gov't C.A. Br. 4, n.2.

Petitioner also asserts that "the notion that [petitioner] could have preserved the disqualification issue by entering into a conditional plea under Fed. R. Crim. P. 11(a)(2) (which requires the approval of the district court and the consent of the government) is wholly unrealistic." Pet. 18. As the court of appeals pointed out, however, petitioner "did not attempt to exercise" that option. Pet. App. 8. Petitioner has no basis for suggesting (Pet. 18) that a conditional plea would necessarily have been rejected by the court and the government. Given that the inquiry under 28 U.S.C. 455(a) is whether there is an appearance of partiality, rather than actual bias on the part of a judge, there is no concrete reason to believe that a judge would routinely or willfully reject a conditional plea agreement seeking to preserve the appearance issue for appeal. Also unavailing is petitioner's assertion that the government insisted that he plead "'straight up' to enough counts to enable the district court to impose a guideline sentence." Pet. 18. Petitioner does not state that the government ever refused to consider any conditional plea.

Petitioner also argues that the rule that a guilty plea waives all non-jurisdictional challenges should not apply here because he did not seek to withdraw his guilty

plea, but "sought a sentencing before an impartial jurist." Pet. 17; accord *id.* at 18. After his plea and before sentencing, however, petitioner did not renew his motion to disqualify or file a petition for mandamus. Indeed, petitioner did not argue below that he was only seeking recusal for the purpose of sentencing (and not for withdrawal of the plea), and the court of appeals accordingly did not address the issue. Moreover, where the underlying legal issue has crystallized before a guilty plea, it has been held that a guilty plea waives issues that arise during sentencing. See *United States* v. *Arango*, 966 F.2d 64, 66 (2d Cir. 1992) (defendant's challenge to illegally seized evidence used in sentencing him waived by his plea of guilty).[1]

In any event, this Court's review is not warranted in this case, because the sentencing demonstrates that there is no basis for a belief that the judge was partial during sentencing. Petitioner was sentenced at the mid-point of the applicable Guidelines range, after the parties urged that petitioner be sentenced at the respective opposite ends of the range. Pet. App. 45-49. The district court, "out of fairness" to petitioner,

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[1] Petitioner also argues (Pet. 14-15) that the court of appeals erred in finding that petitioner's guilty plea was sufficient to constitute a waiver under 28 U.S.C. 455(e), which prevents acceptance of the parties' waiver of the grounds for disqualification under 28 U.S.C. 455(b), but permits acceptance of the parties' waiver of the grounds for disqualification under 28 U.S.C. 455(a) following "a full disclosure on the record of the basis for disqualification." The court of appeals in a footnote simply observed that the alleged grounds for disqualification were set forth both in petitioner's recusal motions and the district court's orders denying the motions. Pet. App. 7 n.6. The court of appeals made its observation in the context of its general conclusion that 28 U.S.C. 455(e) demonstrates that the right guaranteed by Section 455(a) is an individual right subject to waiver by a defendant. Pet. App. 6-8 & n.7.

granted petitioner a discretionary two-level downward departure in determining the applicable sentencing range, as the court concluded that the grouping of the two offenses to which petitioner had pleaded guilty would have resulted in a substantial increase in his sentence. *Id.* at 45. And the court of appeals held that petitioner was properly sentenced. *Id.* at 2 n.1, 9-16. Thus, it is unlikely that one viewing the proceedings would reasonably believe that the judge was biased against petitioner during sentencing.

2. Petitioner also contends (Pet. 19-23) that the court of appeals' ruling rejecting his challenge to the district court's sentencing enhancement for obstruction of justice conflicts with the rule announced in *Williams* v. *United States*, 503 U.S. 193, 201-205 (1992), that when a sentencing court departs on both valid and invalid grounds, a remand is required unless the reviewing court determines that the sentence was reasonable and the sentencing court would have imposed the same sentence absent reliance on the invalid grounds. That rule, which applies to *departures* or other decisions affecting the applicable Guidelines' sentencing range, is inapposite here. As explained in *Williams*, a "remand [for resentencing] is required only if the sentence was 'imposed *as a result of* an incorrect application' of the Guidelines." *Id.* at 202-203 (citing 18 U.S.C. 3742(f)(1)). "When a district court has not intended to depart from the Guidelines, a sentence is imposed 'as a result of' an incorrect application of the Guidelines when the error results in the district court *selecting a sentence from the wrong guideline range.*" *Id.* at 203 (emphasis added).

Petitioner accordingly errs in contending (Pet. 19-21) that the court of appeals should have remanded the case for resentencing after affirming only two of the

three grounds for the district court's obstruction of justice enhancement. Where an enhancement is based on a valid ground, any possible error in relying on other grounds has no impact on the defendant's sentencing range. Under Sentencing Guidelines § 3C1.1, the enhancement must be applied if the defendant engaged in any obstruction or attempted obstruction. The guideline states:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, *increase the offense level by 2 levels.*

Ibid. (emphasis added). That language is mandatory, not leaving application of the guideline to the discretion of the court once conduct constituting obstruction of justice is found. *United States* v. *Ancheta*, 38 F.3d 1114, 1118 (9th Cir. 1994); *United States* v. *Dunnigan*, 507 U.S. 87, 98 (1993). Thus, consideration of an invalid ground, along with a valid ground, in applying the obstruction enhancement does not result in the sentencing court's selecting a sentence from the incorrect Guidelines range and is not an incorrect application of the Guidelines. Accordingly, *Williams* did not require the court of appeals to remand for resentencing.

The court of appeals' decision does not conflict with any of the decisions that petitioner cites. Pet. 20, 21. In each of those cases, there was an error affecting the determination of the correct sentencing range. *United States* v. *Knight*, 266 F.3d 203, 206-210 (3d Cir. 2001) (error in criminal history score); *United States* v.

Thayer, 201 F.3d 214, 229-230 (3d Cir. 1999) (error in applying violation-of-judicial-process enhancement under Sentencing Guidelines § 2F1.1(b)(4)(B)), cert. denied, 530 U.S. 1244 (2000); *United States* v. *Kendrick*, 22 F.3d 1066, 1068-1070 (11th Cir. 1994) (error concerning an invalid basis for acceptance-of-responsibility adjustment); *United States* v. *Tello*, 9 F.3d 1119, 1131 (5th Cir. 1993) (error in failing to reduce defendant's offense level for additional acceptance of responsibility adjustment under Sentencing Guidelines § 3E1.1(b)); *United States* v. *Corley*, 978 F.2d 185, 186-87 (5th Cir. 1992) (error in criminal history score, resulting in decision to depart upward); *United States* v. *Rodriguez-Razo*, 962 F.2d 1418, 1423-1424 (9th Cir. 1992) (reversing obstruction-of-justice enhancement); *United States* v. *Willard*, 909 F.2d 780, 781-783 (4th Cir. 1990) (remanding for resentencing where district court failed to resolve dispute about Guidelines range or state that sentence would have been the same regardless of such resolution). By contrast, in this case, there was no error affecting the determination of petitioner's sentencing range. Regardless of whether petitioner's media campaign constituted obstruction under Section 3C1.1, application of the Guideline was required on the basis of either of the grounds approved by the court of appeals.

Petitioner also argues that "[w]ithout a finding on each of the 'multiple obstructive acts,' the district court may have granted the acceptance of responsibility adjustment, a downward departure, or at least sentenced [petitioner] at the low end of the guideline range." Pet. 20. The court of appeals specifically rejected, however, petitioner's challenges to the district court's denial of petitioner's request for a downward departure and a finding of acceptance of responsibility. Pet. App. 2 n.1 ("As we find that those issues lack merit and do not re-

quire any discussion, we will not address them herein.").[2] Moreover, given the seriousness of the bases that the court of appeals affirmed for the obstruction of justice enhancement, it is reasonable to conclude that the district court would have imposed the same sentence without regard to petitioner's media campaign.

Finally, petitioner asserts (Pet. 22) that the court of appeals clearly erred in finding that he was involved in the attempted arson at his accountant's office. That fact-bound issue does not warrant review by this Court. In any event, as discussed, petitioner's feigning of amnesia to prevent trial independently required the enhancement for obstruction of justice.

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[2] *Williams* would not require a remand for the district court to determine whether to resentence petitioner at the low end of the guideline range without regard to petitioner's media campaign. As discussed, *Williams* requires consideration of a remand only if the sentence was imposed as a result of an incorrect application of the Guidelines in a manner that affects the applicable sentencing range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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